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No. 01-205

In the Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, public utility companies seeking declaratory and injunctive relief in district court on their contractual and constitutional challenge to the annual Special Assessments levied pursuant to the Energy Policy Act of 1992 (EPACT), 42 U.S.C. 2297g *et seq.*, had an adequate remedy before the Court of Federal Claims for purposes of 5 U.S.C. 704, where petitioners had pending in the Court of Federal Claims actions challenging EPACT on the same substantive grounds and seeking refunds of EPACT Special Assessments already paid by those utilities in earlier years.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The initial December 5, 2000, opinion of the court of appeals (Pet. App. 19a-47a) is reported at 234 F.3d 642. The May 3, 2001, en banc order of the court of appeals granting the petition for rehearing en banc and returning the matter to the merits panel for issuance of a revised opinion (Pet. App. 17a-18a) is reported at 247 F.3d 1386. The May 3, 2001, revised opinion of the panel (Pet. App. 1a-16a) is reported at 247 F.3d 1378. The opinion and order of the district court (Pet. App. 48a-59a) is reported at 45 F. Supp. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered May 3, 2001. The petition for a writ of certiorari was filed August 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Administrative Procedure Act (APA) provides a cause of action to challenge agency action in federal district court where "there is no other adequate remedy in a court" under another statute. 5 U.S.C. 704. By its express terms, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). This case concerns whether Section 704 permits petitioners, who can obtain and in fact have already sought judicial review of their claims in the Court of Federal Claims, to bring the same claims in an action for prospective relief in district court under the APA.

1. In 1992, Congress enacted the Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486, 106 Stat. 2776. Under EPACT, the government spun off its uranium enrichment services to a newly created corporation, the United States Enrichment Corporation (USEC). See Pub. Law No. 102-486, § 901, 106 Stat. 2923 (42 U.S.C. 2297). All of the enrichment contracts between the government and the utilities were assigned to the USEC. 42 U.S.C. 2297c(b)(1). The transfer became effective July 1, 1993. 42 U.S.C. 2297b-14(e).

EPACT established the Uranium Decontamination and Decommissioning Fund (the Fund), which is to be used to meet the costs of cleaning up government enrichment facilities. See 42 U.S.C. 2297g-2(b) (establishing the Fund to pay "[t]he costs of all decontamination

and decommissioning activities of the Department [of Energy] * * * until such time as the Secretary certifies and the Congress concurs, by law, that such activities are complete"). The Act provides for the federal government to absorb the lion's share of the clean-up costs. In particular, Congress must contribute $330 million annually, or 68% of the total cost, through annual appropriations over a 15-year period, with the amount adjusted annually to account for inflation. See 42 U.S.C. 2297g-1.

EPACT further provides that the remaining 32% (a figure not to exceed $2.25 billion over 15 years) would be collected in annual installments (not to exceed $150 million per year) over the 15-year period, to be adjusted annually for inflation, from those domestic utility companies that had used government-enriched uranium in the generation of electricity. See 42 U.S.C. 2297g-1. The amount of the fee assessed each domestic utility company is based on the percentage of enrichment work units each had purchased from the Department of Energy, relative to the total number of work units produced by the Department of Energy over the life of the enrichment facilities. The formula thus apportions contributions to the Fund based on each utility's pro-rata consumption of uranium enriched by the federal government. The Department of Energy calculated the amount to be collected from each utility shortly after EPACT was enacted and is collecting those sums annually over the 15-year period. See 10 C.F.R. Pt. 766; 58 Fed. Reg. 41,164 (1993); 59 Fed. Reg. 41,956 (1994). Once a year, each utility is invoiced for its predetermined share of the assessments. See 10 C.F.R. 766.103.

2. Soon after the enactment of EPACT, petitioners and other utility companies filed several separate suits in the Court of Federal Claims challenging the EPACT

assessments on constitutional and contractual grounds. The plaintiffs in those suits asserted that the Court of Federal Claims had jurisdiction to order the refund of monies that were "illegally exacted" from them under EPACT and paid into the Special Assessment Fund. In one of those suits, the Federal Circuit reached the merits of the claims and sustained EPACT against takings and breach of contract theories of liability. See *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998).

After the decision in *Yankee Atomic*, petitioners filed this action in federal district court in New York, relying on the same constitutional and contractual claims they had asserted in support of their "illegal exaction" suits in the Court of Federal Claims. The United States moved to transfer the district court case to the Court of Federal Claims under 28 U.S.C. 1631. Petitioners, the government argued, could not bring suit under the APA because they had an "adequate remedy" in another court within the meaning of Section 704, *viz.* their still-pending refund action in the Court of Federal Claims. The district court denied that motion. Pet. App. 48a-59a. The United States filed an appeal of that denial to the Federal Circuit, as permitted by 28 U.S.C. 1292(d)(4)(A). Pursuant to 28 U.S.C. 1292(d)(4)(B), district court proceedings were stayed pending the decision of the Federal Circuit.

3. In an initial decision issued December 5, 2000, a divided panel of the Federal Circuit affirmed. The majority acknowledged that petitioners had initially brought suit in the Court of Federal Claims seeking a refund of the assessments they already had paid into the Fund. The panel held, however, that petitioners nonetheless could also file a separate suit in district court, so long as they sought only declaratory or other

equitable relief as to prospective payments. The panel majority acknowledged that, in so holding, it was permitting petitioners to "forum shop[]" and thus evade the Circuit's earlier decision in *Yankee Atomic*. Pet. App. 24a ("This district court case does warrant the Government's 'forum shopping' characterization."). The majority nonetheless held that the Court of Federal Claims did not provide an "adequate remedy" to prevent the constitutional wrongs alleged by petitioners under *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), because this case "features a complex ongoing relationship to decontaminate and decommission nuclear facilities." Pet. App. 30a. The majority concluded that "[i]n this complex ongoing relationship, this court, like the Supreme Court in *Bowen*, cannot be sure that a money judgment will adequately substitute for prospective relief," which, the court opined, "lies beyond the powers of the Court of Federal Claims." *Ibid.*

Judge Gajarsa dissented. Pet. App. 33a-47a. The Court of Federal Claims, Judge Gajarsa reasoned, has jurisdiction over all of petitioners' constitutional and contractual claims in the pending refund suits in the Court of Federal Claims. Because petitioners had a fully adequate remedy in the Court of Federal Claims, he explained, suit under the APA was not authorized by 5 U.S.C. 704. Disagreeing with the majority's assertion that the case involves a "complex ongoing relationship" of the type found in *Bowen*, Judge Gajarsa explained that "[a] decision by the CFC [in plaintiffs' pending suits] would effectively moot any prospective relief that the district court could afford." Pet. App. 41a-42a. If the Court of Federal Claims were to hold the assessments unlawful, he noted, that decision would have the effect of declaratory relief: The decision

"would be binding and it is absurd to believe that the [Department of Energy] would continue to require the domestic utilities to make payment of unlawful exactions." *Id.* at 42a.

4. The Federal Circuit granted rehearing en banc, vacated the December 5, 2001, panel decision, and returned the case to the merits panel; the panel in turn issued a unanimous "revised opinion" to "accompan[y]" the en banc court's order. Pet. App. 18a. The new panel decision reversed the district court's refusal to transfer the case to the Court of Federal Claims, holding that the Court of Federal Claims could provide a fully adequate remedy to adjudicate all of petitioners' claims. As a result, the panel concluded, the district court lacked jurisdiction under Section 704 of the APA to adjudicate petitioners' claims. *Id.* at 8a-9a.

The court of appeals distinguished this Court's decision in *Bowen*. Noting that the Court in *Bowen* had expressed doubts as to whether the Court of Federal Claims had jurisdiction to entertain the actions, the court of appeals explained that "this case presents no jurisdictional problems" because "[t]he Court of Federal Claims has long possessed jurisdiction to consider constitutional claims, such as [petitioners'] claims about the EPACT assessments, under the 'illegal exaction' doctrine." Pet. App. 10a. Indeed, the court noted that "the factual background and the constitutional claims at issue in the current litigation overlap with those already before the Court of Federal Claims" in several other lawsuits. *Id.* at 11a.

The court of appeals also distinguished *Bowen* on the ground that it involved a complex, ongoing relationship between the federal government and the States under the Medicaid program. The EPACT program, the court observed, is unlike the Medicaid program, because "the

relationship between Con Ed and the United States features a known and fixed series of payments over time," whereas the Medicaid statutory program featured "shifting populations and demographics, advancing medical technologies, unforeseeable health threats, and varying state and federal economic conditions." *Ibid.*

The court of appeals further noted that the Medicaid controversy at issue in *Bowen* "typically involve[s] state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington." Pet. App. 11a (quoting *Bowen*, 487 U.S. at 907-908). In contrast, "this case does not involve a state at all" but "relates to a contract between the utilities and the Government, and specifically, the utilities' financial obligations under EPACT." *Ibid.* In sum, the court concluded, this case does not "involve '[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets,'" and thus does not involve "state governmental activities that a district court would be in a better position to understand and evaluate." *Ibid.* (quoting *Bowen*, 487 U.S. at 904 n.39, 907-908).

The court of appeals also concluded that "the procedural background and facts of this case indicate that the Court of Federal Claims can supply an adequate remedy even without an explicit grant of prospective relief." Pet. App. 12a. Noting that petitioners had already alleged the same constitutional and contractual theories of recovery in seeking refunds in illegal exaction suits in the Court of Federal Claims, the court reasoned that success on those claims for retrospective relief would effectively provide petitioners with pro-

spective relief. If petitioners prevailed in those suits, the court reasoned, "the United States could not proceed to assess further EPACT payments without again illegally exacting funds." *Ibid.* Noting that res judicata principles "would require immediate refund" of any such assessment, the court stated that "this court cannot imagine that the United States would continue to require the utility companies to pay unlawful exactions." *Ibid.* As a result, "[r]elief from [petitioners'] retrospective obligations will also relieve [them] from the same obligations prospectively." *Ibid.*

Finally, the court of appeals noted that the "procedural background of this case seals the conclusion that [petitioners have] an adequate remedy in the Court of Federal Claims." Pet. App. 13a. Noting that petitioners' district court suit had been filed only after the adverse decision in *Yankee Atomic*, the court reasoned that petitioners had simply "artfully recast [their] complaint to circumvent the jurisdiction of the Court of Federal Claims," engaging in "blatant forum shopping to avoid adequate remedies in an alterative forum." *Id.* at 13a, 14a. The court explained that "[e]very legal issue that [petitioners] seek[] to resolve in this district court case could be (and, in some cases, has been) decided in a suit before the Court of Federal Claims." *Id.* at 14a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any decision of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal argument is that the court of appeals' decision is inconsistent with *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). Pet. 11. *Bowen*,

petitioners appear to argue, stands for the broad proposition that complaints seeking prospective or injunctive relief automatically "fall within the exclusive domain of the district courts." Pet. 14. That reading of *Bowen* is overbroad, incorrect, and textually irreconcilable with 5 U.S.C. 704.

The Administrative Procedure Act (APA) does, as a general matter, provide a cause of action to challenge agency action in district court, subject to certain limits. Jurisdiction for such suits is conferred by 28 U.S.C. 1331; and the APA, 5 U.S.C. 702, expressly waives sovereign immunity from such suits to the extent they do not seek money damages.[1] See, *e.g.*, *Califano* v. *Sanders*, 430 U.S. 99 (1977). Section 704, however, limits the availability of such actions by permitting them only when "there is no other adequate remedy in a court" under another statute. 5 U.S.C. 704. As this Court has explained, Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Bowen*, 487 U.S. at 903. Thus, if adequate review may be obtained in another forum, such as the Court of Federal Claims under the Tucker Act, Section 704 precludes litigants such as petitioners from seeking review under the APA.

Here, the Federal Circuit concluded that a lawsuit in the Court of Federal Claims, brought under the Tucker Act for a refund of money illegally exacted, would provide petitioners with "adequate" review. Nothing in *Bowen* contradicts that conclusion. To the contrary, in *Bowen*, the Court specifically observed that a Tucker Act suit in the Court of Federal Claims can "offer pre-

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[1] Petitioners do not dispute that their district court suit was brought against the United States under the APA.

cisely the sort of 'special and adequate review procedures' that § 704 requires to direct litigation away from the district courts." *Bowen*, 487 U.S. at 900-901 n.31; see also *id.* at 904 n.39. Under the specific circumstances presented in *Bowen*, of course, the Court expressed concern that the Court of Federal Claims might not have had jurisdiction over the claims at issue there. Here, in contrast, the Federal Circuit was confident that the Court of Federal Claims had jurisdiction.

Nor can petitioners persuasively argue that, for some fact-specific reason peculiar to this case, an action in the Court of Federal Claims under the Tucker Act would be inadequate. While petitioners filed this suit seeking prospective relief in district court, they have also filed precisely the same substantive claims in the Court of Federal Claims, demanding retrospective relief. As the Federal Circuit explained, if petitioners were to prevail in the Court of Federal Claims suit, "the United States could not proceed to assess further EPACT payments without again illegally exacting funds." Pet. App. 12a. Because res judicata principles "would require immediate refund" of any such assessment, "[r]elief from [petitioners'] retrospective obligations [would] also relieve [them] from the same obligations prospectively." *Ibid.* Indeed, "a decision by the Court of Federal Claims [in these cases] would effectively moot any prospective relief that the district court could afford." *Id.* at 14a.

The various court of appeals cases that petitioners cite are not to the contrary. Whether or not an alternative remedy is "adequate" necessarily must be examined on a case-by-case basis, and none of the decisions cited by petitioners remotely resembles the current case. Not one of them involved litigants that had already brought suit for retrospective relief in the Court of Federal Claims and then—following the issuance of

unfavorable Federal Circuit precedent—filed almost identical claims in APA actions for prospective relief in district court. Nor did any of them hold, as petitioners suggest, that an otherwise available Tucker Act remedy must automatically be considered "inadequate" for purposes of Section 704 merely because the plaintiff, in the APA action, requests prospective relief.[2]

For similar reasons, the decision below does not, as petitioners assert, limit *Bowen* "to its own facts." Pet. 16. The inquiry established by *Bowen* is always the

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[2] For example, while petitioners rely on *Polanco* v. *DEA*, 158 F.3d 647 (2d Cir. 1998), the court in *Polanco* found that the plaintiffs there could not bring any action at all—for retrospective or prospective relief—in the Court of Federal Claims under the Tucker Act. 158 F.3d at 652 & n.3. *Polanco*, moreover, is questionable authority following this Court's decision in *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999). Addressing the scope of the waiver of sovereign immunity in 5 U.S.C. 702, the Court in *Polanco* held that Section 702's bar against suits seeking "money damages" is inapplicable so long as the plaintiff seeks "equitable relief." 158 F.3d at 652. *Blue Fox*, however, makes it clear that "the equitable nature of the" relief sought "does not mean that [the] ultimate claim was not one for 'money damages.'" 525 U.S. at 262. Petitioners' reliance on *Randall* v. *United States*, 95 F.3d 339 (4th Cir. 1996), cert. denied, 519 U.S. 1150 (1997), is misplaced for similar reasons. There, as in *Polanco* and unlike here, the plaintiff could not bring a suit for "monetary damages on which to premise jurisdiction under the Tucker Act." *Id.* at 348. Finally, petitioners' reliance on *Veda, Inc.* v. *United States Department of the Air Force*, 111 F.3d 37 (6th Cir. 1997), and *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475 (2d Cir. 1995), is misplaced, because those decisions do not address Section 704, and nowhere address the adequacy of the Tucker Act remedy. Instead, they address only whether the actions were for "money damages" within the meaning of 5 U.S.C. 702. On that issue, moreover, they (like *Polanco*) are questionable authority following *Blue Fox*.

same, *i.e.*, whether the alternative remedy is "adequate" for purposes of Section 704 of the APA. Here, the court of appeals noted that the factors that had led to the finding of inadequacy in *Bowen* were completely absent. Unlike in *Bowen*, in this case there is no doubt as to whether the Court of Federal Claims will assert jurisdiction. Moreover, unlike in *Bowen*, there is no "complex, ongoing federal-state relationship"; there are no "constantly shifting balance sheets"; and there are no "state governmental activities." Nor do petitioners suggest any other factor that might render a Tucker Act remedy inadequate.

In essence, petitioners insist that one may always avoid the express mechanism for review provided by the Tucker Act by asking for prospective relief that the Court of Federal Claims cannot grant. As the court of appeals properly recognized, there simply is no basis for that bright-line rule, particularly where, as here, the claimants were pursuing substantially the same claims retrospectively under the Tucker Act at the time they filed their APA suit. Indeed, the rule in the Federal Circuit as well as in other circuits long has been that "[a] party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of $10,000." *Kanemoto* v. *Reno*, 41 F.3d 641, 646 (Fed. Cir. 1994). This rule makes clear what petitioners conveniently ignore: The courts are not bound by a plaintiff's allegations of the need for prospective relief. Rather, the courts assess jurisdictional questions by reference to the "true nature of the action." *Katz* v. *Cisneros*, 16 F.3d 1204, 1207 (Fed. Cir. 1994). See also Pet. App. 13 (citing authorities from other circuits).

In this case, the "true nature" of petitioners' district court suit was to avoid the jurisdiction of the Court of Federal Claims (and that of the Federal Circuit), where petitioners had initially filed suit but where other utilities have been unsuccessful on the merits. Seeking to escape the same fate, petitioners hope now to recover the EPACT assessments already paid by obtaining a declaration in district court, and then using that declaration as res judicata and collateral estoppel in their suits to recover past payments now pending in the Court of Federal Claims. Petitioners' purported need for prospective relief is thus a fiction.

Indeed, petitioners cannot claim that the unavailability of injunctive relief in the Court of Federal Claims renders suit in that forum inadequate, because petitioners are not entitled to equitable relief in *any* court, including in district court under the APA. The traditional rule is that equitable relief is unavailable where there is an adequate remedy at law. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (quoting *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506-507 (1959)); *Mikohn Gaming Corp.* v. *Acres Gaming, Inc.*, 165 F.3d 891, 898 (Fed. Cir. 1998) (same).[3] As noted in *Sampson*, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation,

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[3] See also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) ("The equitable remedy is unavailable absent a showing of irreparable injury."); *O'Shea* v. *Littleton*, 414 U.S. 488, 502 (1974) (noting that "[r]espondents have failed, moreover, to establish the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law").

weighs heavily against a claim of irreparable harm." 415 U.S. at 90 (quoting *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Here, petitioners have filed an action for such corrective, compensatory relief in the Court of Federal Claims. Because that suit can offer petitioners legal relief, they have no basis for seeking equitable relief under the APA. Indeed, the district court in this case (in the context of a discovery order) reached precisely that conclusion. Petitioners could not meet the equitable requirement of irreparable injury, the court found, because petitioners have a fully adequate remedy at law in the Court of Federal Claims in the form of a suit for a refund of any assessment illegally exacted. See *Consolidated Edison Co.* v. *United States*, 54 F. Supp. 2d 364 (S.D.N.Y. 1999), appeal dismissed for lack of jurisdiction, No. 99-6239, 2000 WL 713417 (2d Cir. May 11, 2000). For the same reason, they lack the irreparable injury necessary to obtain permanent injunctive relief.[4]

2. Petitioners also assert (Pet. 19-22) that the decision below conflicts with *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). That contention is without merit. As an initial matter, *Eastern Enterprises* did not concern the meaning or effect of 5 U.S.C. 704. Instead, it concerned whether a "takings" claim under the Fifth Amendment is premature if a Tucker Act remedy is available. 524 U.S. at 521 (plurality opinion). As the Court explained in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 193-

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[4] Petitioners' citation of cases regarding the availability of judicial review, Pet. 17-18, is beside the point. The question here is not whether review is available. It is where that review should be had.

195 (1985), a claim that the government has taken property without "just compensation" ordinarily is premature—because no violation has yet occurred—until available means of obtaining compensation have been employed and compensation has been denied. Here the question is not whether a takings claim is ripe. It is whether the APA and Section 704 afford petitioners an alternative avenue for relief in view of their already pending actions in the Court of Federal Claims.

More fundamentally, the plurality in *Eastern Enterprises* concluded that Congress did not intend to remit the plaintiffs in that case to a Tucker Act remedy. Distinguishing the Court's earlier decisions, which suggested that the availability of a Tucker Act remedy renders any takings claim in federal district court premature, the plurality concluded that "in a case such as" *Eastern Enterprises* itself, "it cannot be said that monetary relief against the Government is an available remedy" because "[t]he payments mandated by the Coal Act, although calculated by a Government agency, are paid to the privately operated Combined Fund," and Congress did not contemplate "that the Treasury would compensate coal operators for their liability under the Act." 524 U.S. at 521. Accordingly, the plurality reasoned, in a situation involving mandated payments by one private party to another, the "presumption of Tucker Act availability must be reversed." *Ibid.* Here, by contrast, EPACT requires domestic utility companies to pay assessments directly to the United States and petitioners seek a refund of payments from the United States.

Eastern Enterprises is also distinguishable because there, unlike here, the claims were all premised on the Due Process Clause and the Takings Clause. Here, in contrast, petitioners also contend (in multiple counts of

the complaint) that the EPACT assessments violate their contract and settlement rights with the government. Such contract matters plainly fall within the exclusive jurisdiction of the Court of Federal Claims. Indeed, it is well established that the district courts have no power under the APA to award declaratory or equitable relief on contract claims.[5]

3. Petitioners contend (Pet. 23-26) that this Court should grant review because the decision below creates a conflict among the circuits concerning the proper

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[5] See, *e.g.*, *Sharp* v. *Weinberger*, 798 F.2d 1521, 1524 (D.C. Cir. 1986) (Scalia, J.) ("We know of no case in which a court has asserted jurisdiction either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligations."); *Zelman* v. *Gregg*, 16 F.3d 445, 448 (1st Cir. 1994) ("equitable relief cannot be obtained on contract claims against the government"); *North Star Ala. Hous. Corp.* v. *United States*, 9 F.3d 1430 (9th Cir. 1993) (en banc) (same), cert. denied, 512 U.S. 1220 (1994); *Eagle-Picher Indus., Inc.* v. *United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (APA's waiver of sovereign immunity "does not extend to actions founded upon a contract with the United States"); *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990) (effort to obtain specific performance of promise allegedly made by an agency not within district court's jurisdiction). Petitioners' claim (Pet. 21-22) that the decision below conflicts with *In re Chateaugay*, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 813 (1993), and *Student Loan Marketing Ass'n* v. *Riley*, 104 F.3d 397 (D.C. Cir.), cert. denied, 522 U.S. 913 (1997), fails for the same reasons as petitioners' claim of conflict with *Eastern Enterprises*. Both of those cases address the ripeness of takings claims in light of *Williamson County*, *supra*, rather then the availability of an APA action under 5 U.S.C. 704; neither involved contract claims; and neither involved litigants that already had takings claims pending in the Court of Federal Claims when they filed suit for declaratory relief in another forum.

forum for the litigation of due process claims. That purported conflict is illusory.

In this case, the court of appeals held that petitioners' due process claims were cognizable in the Court of Federal Claims under the "illegal exaction" doctrine. Pet. App. 5a. Court of Federal Claims and Federal Circuit precedent hold that that doctrine permits plaintiffs to recover under the Tucker Act monies illegally taken by the government, even if the plaintiff cannot identify a statute mandating the return of funds. The Court of Federal Claims has observed:

> [I]t is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.

Eastport S.S. Corp. v. *United States*, 372 F.2d 1002, 1007 (1967).

Petitioners assert that their due process claims cannot be asserted in the Court of Federal Claims because the Due Process Clause is not a "money-mandating" cause of action. Pet. 23. Petitioners correctly recognize the *general* rule that the Court of Federal Claims lacks

jurisdiction over due process claims. That constitutional provision, unlike the Just Compensation Clause of the Fifth Amendment, does not itself mandate the payment of money in compensation for the plaintiff's loss. See *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *United States* v. *Mitchell*, 463 U.S. 206, 216-217 (1983) (plaintiff generally "must demonstrate" that the "source of substantive law he relies upon can fairly be interpreted as *mandating* compensation by the Federal Government for the damage sustained") (emphasis added) (internal quotation marks omitted). See, *e.g.*, *Murray* v. *United States*, 817 F.2d 1580, 1582-1583 (Fed. Cir. 1987); *Montalvo* v. *United States*, 231 Ct. Cl. 980, 982-983 (1982). But petitioners ignore the fact that the Court of Federal Claims permits monetary recovery under the Tucker Act in the absence of a money-mandating statute or constitutional provision *if* the plaintiff can assert an "illegal exaction" claim of the sort recognized in *Eastport*. Specifically, the Court of Federal Claims permits a plaintiff to seek damages under the Tucker Act if the "value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp.*, 372 F.2d at 1007; see, *e.g.*, *Castillo Morales* v. *United States*, 19 Cl. Ct. 342, 345 (1990); *Betz* v. *United States*, 40 Fed. Cl. 286, appeal dismissed, 155 F.3d 568 (Fed. Cir. 1998).

Thus, following *Eastport*, Tucker Act jurisdiction has been recognized if the claim arises *either* (1) under a "money-mandating" statute or constitutional provision, or (2) under a claim that the money sought by the plaintiff has been "illegally exacted" by the government from the plaintiff in contravention of a statute or constitutional provision. See *Testan*, 424 U.S. at 400-402 (noting and distinguishing the illegal exaction theory of

Eastport and explaining that, in the absence of such a claim, the jurisdiction of the Court of Federal Claims "depends upon whether any federal statute can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"). In *Mallow* v. *United States*, 161 Ct. Cl. 446 (1963), for example, the Court of Claims held that it had jurisdiction over a suit seeking to recover an illegally exacted fine, either as a claim founded upon an Act of Congress, or as a claim founded upon the Constitution. See also *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl.) (upholding illegal exaction theory as basis for jurisdiction), cert. denied, 348 U.S. 834 (1954). In this case, the court of appeals merely applied that same doctrine to hold that petitioners could bring a Tucker Act suit to recover the sums that were allegedly exacted from them in violation of the Due Process Clause.

Bowing to that weight of authority, petitioners do not question whether the Court of Federal Claims has applied the illegal exaction theory to adjudicate statutory claims. Rather, petitioners assert that such jurisdiction cannot extend to *constitutional* claims, such as their due process claims. Pet. 24-25. Petitioners, however, offer no reason why the illegal exaction doctrine, as articulated by the Federal Circuit, would be limited to statutory claims. The text of the Tucker Act clearly contemplates adjudication of constitutional issues. It affords the Court of Federal Claims jurisdiction to render judgment "upon any claim against the United States founded either upon the Constitution[] or any Act of Congress." 28 U.S.C. 1491(a)(1). Petitioners offer no reason why the illegal exaction doctrine would apply differently for claims "founded * * * upon * * * any Act of Congress" than it does for claims

"founded * * * upon the Constitution" when the Tucker Act mentions both in the same clause.

Finally, petitioners' contention (Pet. 23-24) that there is a conflict in the circuits on this issue is without merit. Most of the cases cited by petitioners simply do not address the scope of the illegal exaction doctrine. For example, *Rothe Development Corp.* v. *United States Department of Defense*, 194 F.3d 622 (5th Cir. 1999) (cited at Pet. 23), nowhere holds that a plaintiff may bring a due process claim in district court notwithstanding its ability to bring a Tucker Act illegal exaction claim for precisely the same constitutional injuries. To the contrary, in that case the court held that it lacked jurisdiction over the appeal—and that the appeal had to be transferred to the Federal Circuit—because the suit sounded in quasi-contract and arose under the Tucker Act. *Id.* at 626. Moreover, in *Rothe* the plaintiff could not have brought a claim for the return of illegally exacted money in the Court of Federal Claims because the plaintiff there had not paid money to the government. Instead, the suit challenged the government's decision to award a contract opportunity to one of the plaintiff's competitors. *Id.* at 623. The remaining cases cited by petitioners are similarly distinguishable.[6] And certainly none holds that liti-

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[6] *Polanco* v. *DEA*, *supra* (cited at Pet. 23), for example, involved an allegedly defective forfeiture, and nowhere addressed whether the plaintiff could have brought a Tucker Act suit under an illegal exaction theory. Further, as explained above (p. 11 n.2, *supra*), *Polanco*'s analysis of whether the APA action was barred by sovereign immunity has been superseded by this Court's more recent decision in *Blue Fox*. Similarly, neither *Marshall Leasing, Inc.* v. *United States*, 893 F.2d 1096, 1101 (9th Cir. 1990) (cited at Pet. 24), nor *Lake Mohave Boat Owners Ass'n* v. *National Park Service*, 78 F.3d 1360, 1365 (9th Cir. 1996) (cited at Pet. 23),

gants, such as petitioners, that have *already* filed due process actions in the Court of Federal Claims—and over which the Court of Federal Claims has exercised jurisdiction under the illegal exaction doctrine—may later bring the same claims in district court under the APA.

Ultimately, the fallacy of petitioners' argument is most apparent from petitioners' own actions. Notwithstanding their assertion that substantive due process constitutional claims cannot be brought in the Court of Federal Claims, petitioners in fact have brought precisely such claims in that court seeking a refund of their payments of prior EPACT assessments. Such a willingness to undermine their own claims can only be explained by petitioners' desire to escape adverse Federal Circuit precedent, such as *Yankee Atomic*.[7] In what

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considered the illegal exaction theory, much less rejected it. And *Clark* v. *Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984) (cited at Pet. 24), is even further afield. In that case, the plaintiff claimed that the government had violated his First Amendment rights by dismissing him; and he sought reinstatement to his former position. Because the plaintiff had not paid any money to the government, an illegal exaction claim—under the First Amendment or the Due Process Clause—was not a possibility.

[7] While petitioners assert (Pet. 11) that *Yankee Atomic* did not directly decide the due process and takings questions presented in their Court of Federal Claims and district court actions, *Yankee Atomic* directly decided a takings claim and disposed of the contract claims asserted by petitioners. *Yankee Atomic* thus stands as a direct roadblock to petitioners' lawsuit. Furthermore, the same constitutional claims involved in this case have been rejected on the merits by the Court of Federal Claims in five other cases brought by other nuclear utilities, including Commonwealth Edison and Carolina Power, both of whom are named plaintiffs in petitioners' district court action. See *Omaha Pub. Power Dist.* v. *United States*, 44 Fed. Cl. 383 (1999), appeal pending, No. 99-5160 (Fed. Cir. argued Nov. 2, 2000); *Maine Yankee Atomic Power Co.*

the court of appeals properly characterized as "forum-shopping," Pet. App. 24a, petitioners are plainly seeking "to circumvent the jurisdiction of the Court of Federal Claims," *id.* 13a, so as to escape adverse precedent. That sort of forum shopping should not be countenanced by the courts. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v. *United States*, 44 Fed. Cl. 372 (1999), appeal pending, No. 99-5156 (Fed. Cir. argued Nov. 2, 2000); *Sacramento Mun. Util. Dist.* v. *United States*, 44 Fed. Cl. 395 (1999), appeal pending, No. 99-5158 (Fed. Cir. argued Nov. 2, 2000); *Commonwealth Edison Co.* v. *United States*, 46 Fed. Cl. 29 (2000), appeal pending, No. 00-5069 (Fed. Cir. argued *en banc* Oct. 3, 2001); *Carolina Power & Light Co.* v. *United States*, 48 Fed. Cl. 35 (2000), appeal pending, No. 01-5040 (Fed. Cir.).